

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

PARAMOUNT PEST CONTROL SERVICE, a
corporation,

Appellant,

v.

CHARLES P. BREWER, individually and
doing business as Brewer's Pest
Control, ROSALIE BREWER, his wife,
RAYMOND RIGHTMIRE, CARL
DUNCAN and EARL MERRIOTT,

Appellees

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT OF OREGON

APPELLANT'S REPLY BRIEF

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INTRODUCTION

This court may desire appellant's position on the matters contained in appellees' brief which for the most part admits the contentions of appellant. Some further statement of the true facts of the case and a brief analysis of appellees' position may be desirable. Naturally, appellees would like to leave the impression with this court that appellant was

running its business in a haphazard way, working against its managers and franchise holders and preventing them from making any money and that Brewer in particular was abused, mistreated and unfairly dealt with in the Oregon territory. The record will show the facts to be directly to the contrary.

ADDITIONAL STATEMENT OF CASE

Appellees' statement of the case is neither complete nor always accurate. In five hundred pages of record there are but two references that are not to Brewer's testimony shown by appellant to be untrustworthy (Appellant's Br. 24).

Mr. Sibert began this business in 1927 (114) and Mr. Fisher in 1935 (399). They made their partnership in 1938 (115), came to Oregon in 1942 (115) and incorporated in 1945 (Ex. 1). They worked sixteen to twenty hours a day (116) and increased their business, and developed two forms of contract known as the managerial and franchise contracts for individuals to handle their business in allotted territory. The managerial form provided a salary of \$250.00 a month, with certain additions when he started a new territory, but when the business in that territory was developed to about \$3,000 a month gross, he was given a franchise (233) under which the agent could make more money.

At the time of this trial, appellant had in existence eight franchise (370) and three managerial contracts (371). Experience showed it cost the

franchise holder forty-five to seventy-five per cent. of the gross business to pay expenses. The average was about 60% (235) which would leave 20% each for the company and the agent. On a \$3,000 a month business, the agent would make \$850.00 and the company \$600.00 (233). No agent, manager or franchise holder had ever gone broke (370). Some franchise operators were making a net of \$6,000 to \$24,000 annually (371). These contracts were identical with Brewer's.

When Brewer came with the company in 1946, he was given both forms to take home and study (401). He wanted a franchise, but it was pointed out it was better for him to start on a manager's contract which he did until July 1, 1946 (403-4). Brewer was treated no different than anyone else holding similar contracts and had he been honest and worked he would have developed a fine business which would have paid him good money through the years. If this was not true, why did he conspire to leave Paramount, take its customers, its employees and immediately go into business for himself? If the business had been as bad as he attempts to claim before the trial court, he would never have gone into it on his own responsibility without the financial backing and good name of Paramount. Obviously he, early in his employment, determined to make the business his own and to build it on Paramount's money. He asked to have the payments changed so that he would only have to pay the company a dollar if he personally drew

a dollar and he could use the rest of the money to develop a business which he intended to appropriate to himself. In contrast to this commercial piracy, Paramount has always been fair in its treatment even to the extent of paying the expenses of the Eastern Oregon development for Brewer's business, one-half of which he agreed to but never paid.

ADMISSIONS IN APPELLEES' BRIEF

1. **Of Appellant's Error No. 1:** Appellant asks for a finding to the effect that it does in Oregon, the same business that it does in California, as a basis for an injunction to protect that business. The right to the finding is clearly established (App. Br. 6, 7) and there is not one word of denial in appellees' record.

2. **Of Appellant's Error No. 4:** In Assignment of Error No. 4 appellant points out that it was entitled to a monetary judgment on various accounts upon two bases: (i) contract obligations that have in some instances been partly paid in acknowledgment of the obligation, and (ii) in the other instances, specific statements of damages unpaid. There is no answer to this section of appellant's brief (pp. 32-7). Perhaps appellees feel that a monetary judgment is of little benefit to appellant or detriment to them. Nevertheless, appellant feels its right to such has been clearly established and it claims when equity rightly assumes jurisdiction over a cause for any purpose, ordinarily it retains the cause for all purposes, and proceeds to final examination of the entire controversy and estab-

lishes purely legal rights and grants purely legal remedies therein, and the jurisdiction of equity is tested by the facts existing at the inception of the suit, and in this case an injunction was the dominant relief sought. *Mantell v. International Plastic Harmonica Corp. et al* (1947) N. J. , 55 A. (2d) 250, 173 A.L.R. 1185, supported by note at pages 1198 to 1202.

3. **By Appellees other than Charles P. Brewer:** Appellant wonders what happened to the other appellees besides Brewer. Have they abandoned him? Other than a reference to their immaterial testimony that they received no secret formulae (Appellee's Brief p. 6), there is no mention of them or any defense in their behalf. All other citations of testimony are to Brewer's, all argument in his behalf, all references to his contract and none to that of other employees. There is no answer by defendants Rosalie Brewer, Raymond Rightmire, or Earl Merriott to the claims of appellant.

APPELLEES' FAILURE TO ANSWER APPELLANT'S ERROR NO. 2—CONSPIRACY

1. Twenty out of thirty-eight pages in appellant's brief were given to citations in the record and to legal authorities to prove a conspiracy between these appellees.

There is but one reference to conspiracy in appellees' brief, to-wit: "These findings negative the conspiracy claimed by the appellant" (Appellees' Br. 6).

2. This means that appellees rely solely on the trial court's alleged finding without naming it. There is no finding on conspiracy, as to its existence or non-existence, made by the trial court.

The nearest approach is finding No. 4 (75), saying that Brewer engaged in the pest control business and employed Rightmire and Merriott and admits serving "upwards of one hundred customers of the plaintiff." Nowhere in appellees' record is there any effort to support the trial court in failing to comply with the Federal Rules of Civil Procedure, No. 52 (a) on so obvious and prominent an issue.

Appellant has no quarrel with the principle that findings of fact shall not be set aside unless clearly erroneous, but denies its application here because there is no finding on conspiracy, and if Finding No. 4 (75) is an attempt to negative conspiracy, then clearly the law permits an appellate court to inquire into the evidence the court had in mind to support its finding.

Wisely, the appellate court does not put too much stress upon the findings of a trial court when prepared by the prevailing parties' attorney with as little direction as was herein given by the court's "Memorandum Opinion" (73).

Under Rule 52 (a), when findings are contrary to the weight of the evidence, even though they are sustained by the spoken word from the witness stand, the appellate court has power to reverse any judgment based thereon. While the findings are

presumptively correct, they are not conclusive on appeal as against the clear weight of evidence.

In the case of *State Farm Mutual Automobile Insurance Co. v. Bonacci* (CCA 8th) 111 F. (2d) 412, the court said:

“The rule plainly contemplates a review by the Appellate Court of the sufficiency of the evidence to sustain the Findings.” (p. 415).

The court, in its decision, quoted *Simpkins Federal Practice* (3rd ed.) p. 488, as follows:

“Under the new practice where Findings are made by the Court without a Jury, the Appellate Court is not limited to the mere question whether there is any substantial evidence to support them but may set them aside if against the clear weight of the evidence, at the same time giving full effect to the specific qualification of the Trial Judge to pass on creditability.”

Appellant urges upon this court that there is no finding on the question of conspiracy and no fact or reason given in appellees' brief why such finding should not be made in accordance with the evidence and as contended by appellant (Appellant's Br. 7-27, incl.).

APPELLEES' FAILURE TO ANSWER ERROR NO. 3—EQUITABLE RELIEF

The only phase of this case which apparently alarms Charles P. Brewer is the possibility of injunctive relief in favor of the appellant. It was the relief which the trial court came nearest to grant-

ing (Tr. 73). It would prevent Brewer or any associate still with him, from continuing their commercial piracy. Brewer's contentions on this point present the only semblance of an issue upon this appeal. They may be classed as follows:—

1. Injunction should not issue because no secret processes were disclosed to appellees (Appellees' Br. 6). Owing to the business relations that were disturbed and the contractual relations between employer and customer that were broken, this contention is immaterial, and Finding No. 5 (75), based on such claim, is equally immaterial and goes to no real issue in this case. (See Appellant's Br. pp. 28-29, incl.)

2. **Repudiation of Contract:** The claim by Brewer that Paramount repudiated his franchise, was the only defense that he pled in this case (70). It has been fully refuted in appellant's brief (pp. 19 to 27).

3. In the remaining portion of appellees' brief there are confused and irrelevant claims whose only purpose could be to cloud the issue. One of these claims is that Paramount "breached the contract" (Appellee's Br. p. 7). This is an affirmative defense and should be pled, but there was no pleading that Paramount breached its franchise in appellees' Answer (67 to 71). There is no evidence of a breach submitted as such. There was no finding to that effect (74-77). The question cannot be raised for the first time on appeal.

4. Appellee Brewer claims his franchise was unreasonable and unfair. This claim was not pled in his Answer (67-71). If he is sincere in such a claim, as the asserter of the fact, he has the burden of proving it and there is no proof. The lack of proof was so obvious to the trial court (even holding in Brewer's favor on other issues) that it deleted any proposed finding that the contract was "not fair and reasonable" (76). The appellees took no appeal from this holding of the court. Appellant has shown eight individuals, operating in different territories under these contracts, have earned substantial incomes, and under such conditions a contract could not be considered unfair or unjust.

In effect, Brewer claims though he contracted that he would give ninety days' notice of terminating his agreement and contracted to refrain from canvassing, soliciting or catering to any customers of his employer known to him, and admits he did not give such notice because he was afraid that the company would take prompt steps against his conduct, and he did solicit and serve not less than a hundred and forty-two of appellant's customers, that no injunction should prohibit him from continuing his unlawful conduct, but should leave him free, irrespective of his contract or the appellant's alleged violation thereof, to continue to interfere and cause the breach of contracts to which he was not even a party.

It is well established in law that this appellant has a right to perform a contract which it has made

with its customers and to reap the profits resulting from that contractual relation and performance, and appellant has a right to expect and demand performance by these customers, and such rights are declared property which either the customer or Paramount may ask to be performed, and certainly freed of the unlawful interference by Brewer or his associates. (84 A.L.R. 43)

This principle is clearly recognized in *Snow Cap Dairy v. Robanske* (1935) 151 Or. 59 (47 P. 2d) 977, where the court said:

“We agree with counsel for appellant, that a party will be enjoined from soliciting customers of another party in violation of his contractual obligation to refrain therefrom. In every case cited by appellant in support of this proposition, the contract of employment had a clause to the effect: That when the employment should cease, the employee would thereafter refrain from soliciting the customers of the employer to give their patronage to some one else * * *. Where one sells a professional business and its good will, there would seem to be an implied contract that the vendor would not thereafter enter into competition with the vendee and thus destroy the good will he sold.” (p. 61).

See *Columbia Tent and Awning Company v. Thiele*, 135 Or. 511.

In *Fairbanks Morse & Co. v. Texas Electric Service Co.* (CCA 5th 1933) 63 F. (2d) 702, the court said:

“It must be conceded that, generally speaking, it is tortuous for one, without justification, to

induce another to breach a contract, and that it is quite generally assumed as a matter of course that an injunction will be granted when the breach of valid contracts is, without legal justification, being or about to be induced." (p. 705) (No contractual relation here involved.)

See *Paramount Pictures, Inc. et al v. Leader Press, Inc. et al* (CCA 10th 1929) 106 F. (2d) 229 (no contract involved); *Falstaff Brewing Corp'n v. Iowa Fruit & Produce Co.* (CCA 8th 1940) 112 F. (2d) 101 (employment contract involved).

Even strangers to a contractual relation may be enjoined from aiding the violation thereof by others. *Lyle et al v. Haskins et al* (1946) 24 Wash. (2d) 883, 168 P. (2d) 797.

CONCLUSION

The record must impress the court that appellant has used diligent efforts to keep abreast of the times in the treatment of all pests, that it has developed contractual relations satisfactory to all except Brewer and his associates, and that it had trained Brewer and given him assistance beyond the contractual obligations.

It must also be apparent that Brewer and wife could not resist the temptation to take that business for themselves when at their employer's expense it had been developed to be a profitable and going concern.

The failure of appellees to answer the propositions made is a confession of their legal liability

and their servicing for themselves customers that they knew were under contract with appellant and their preparation to take over that business by procuring printed matter in their own name long before they made any disclosure of their intention to leave appellant's employ, is an indication of the lack of moral as well as legal responsibility, and their admission in securing the business of appellant for themselves clearly renders them liable to injunctive and legal relief.

Respectfully submitted,

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and

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